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Supreme Court, U.S.
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NO. 84-1768

IN THE

SUPREME COURT OF THE UNITED STATES

ALABAMA DEPARTMENT OF CORRECTIONS,

PETITIONER,

vs.

WILLIE JAMES GLOVER,

RESPONDENT.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Respondent

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QUESTION PRESENTED FOR REVIEW

Whether or not the decision below taxing attorney's fees as cost against the State of Alabama violates the Eleventh Amendment where the State of Alabama through its Attorney General voluntarily involved itself as counsel for the Defendant and admitted that his conduct was "within the scope of the discretion and responsibilities" of his office.

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OPINIONS BELOW

The opinion of The United States Court of Appeals for the Eleventh Circuit is reported at 734 F.2d 691 (11th Cir. 1984). It appears as Appendix B to the Petition for Certiorari. The opinion of the United States District Court for the Middle District of Alabama appears as Appendix A to the Petition for Certiorari.

JURISDICTION

It appears that the Petition for Certiorari was filed within ninety days of February 27, 1985, the date of the denial of the Petition for Rehearing below. Jurisdiction of this Court appears to be conferred by 28 U.S.C. §1254.

STATEMENT OF THE CASE

Respondent, Willie James Glover, (hereafter "Glover") finds it necessary to include certain significant facts omitted from the Petitioner's statement of the case. It cannot be denied that the Defendant Towns was acting as an agent of the State at all times material to Plaintiff's complaint. Petitioner Alabama Department of Corrections (hereinafter "ADOC") admitted this in answer to paragraph 5 of Glover's complaint. (R.28). ADOC further stated in answer to Plaintiff's amended complaint that Towns' "conduct was within the scope of the discretion and responsibilities of their public offices and was reasonable and proper in light of all the circumstances as they appeared at the time of their conduct...". (R.27-28). It is further significant that Defendant Towns was represented at all times in this litigation by the Attorney General of the State of Alabama.

REASONS FOR DENYING THE WRIT

1. Petitioner has failed to present any "special or important reasons" for the grant of certiorari and have failed to invoke any of the criteria specified in Supreme Court Rule 17.1(a) and (c); there is no conflict with the decision of another federal court of appeals; there is no suggested departure "from the accepted and usual course of judicial proceedings;" and the decision below accords with applicable decisions of this Court.

The trial court correctly awarded attorneys fees against the State of Alabama. Glover is well aware that, in general, the Eleventh Amendment bars an award of damages against a state official in his official capacity or against the state. Edelman v. Jordan, 415 U.S. 651 (1974). Were it not for the Eleventh Amendment bar Plaintiff would be entitled to recover the judgment awarded him against the State of Alabama since Defendant Towns was admittedly acting within the line and scope of his employment as its agent.

Rather than conflict with this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978) the court of appeal's decision is based on that ruling. In Hutto v. Finney, this court held that an award of attorney's fees under 42 U.S.C. §1988 was not barred by the Eleventh Amendment. Hutto differed from the instant case, however, because it concerned an award of injunctive relief. Subsequently, the Fifth Circuit Court of Appeals correctly interpreted Hutto and held that attorneys fees may be awarded a successful Plaintiff against a State employee even though only monetary damages are awarded. McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979). As the court stated in McNamara, "there is no Eleventh Amendment bar to such award and they need not be based on bad faith." 606 So.2d at 626.

Plaintiff submits that the policy behind the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988 supports the decision to award attorneys fees against the State. In passing that statute, Congress sought to encourage individuals to file suit to vindicate their

constitutional rights by awarding attorneys fees to successful plaintiffs. As a practical matter an award of attorney's fees against Defendant Towns alone is the same as refusing to award attorney's fees at all. Defendant Towns is a low-level state employee and satisfaction of any judgment against him will be extremely difficult. On the other hand, attorney's fees awarded against the State will most certainly be paid. That latter course is much more likely to encourage individuals to attempt to vindicate their constitutional rights.

ADOC argues that because the State of Alabama has never been a party to this litigation attorneys fees cannot be taxed as costs against it. That argument is totally without merit. Congress made clear in the legislative history of the Act that those fees could be awarded against the government whether or not it is a named party. S.Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1978 U.S. Code Cong. and Admin. News pp. 5908, 5914. In Barrett v. Thomas, 649 F.2d 1193 (5th Cir. 1981) the Fifth Circuit Court of Appeals stated:

> It is beyond settle law that a section 1988 attorneys fees award may run against a public treasury for section 1983 violations by public officers acting in their official capacities even though the public entity is not named as a defendant in the suit.

649 F.2d at 1201.

In Barrett, the Court held that an attorneys fee could be awarded against a county for §1983 violations by a sheriff even though the county was not named as a defendant

in the suit and was denied an opportunity to intervene. In the instant case, the State of Alabama has been protected at all times by representation by the Attorney General. Indeed the State of Alabama voluntarily involved itself in this lawsuit by representing the Defendant employee at every stage of the litigation. It cannot now argue that the judgment was against that Defendant - its admitted agent - only in his "individual capacity" and seek to disclaim any liability for attorney's fees arising out of his conduct.

The Eleventh Circuit Court of Appeals articulately stated why the ADOC's argument on this issue must fail:

> The fact that damages were awarded against defendant Townes in his individual capacity only does not preclude the assessment of attorney's fees against the State. The sole reason that damages were not assessed against him in his official capacity is that the Eleventh Amendment bars such an award. (Citations omiteed). It is undisputed that the defendant's statement was made while he was performing his official duties as an employee of the State of Alabama.

734 F.2d at 696 (1984).

CONCLUSION

Accordingly, Petitioners have failed to advance any reason for the grant of certiorari and, for the foregoing reasons, it is respectfully submitted that its petition should be denied.

Frank M. Wilson

FRANK M. WILSON,
Attorney for Respondent

CERTIFICATE OF SERIVCE

I hereby certify that on this the 22nd day of August, 1985, a copy of the foregoing brief was served on the Honorable Billington M. Garrett, Assistant Attorney General, by placing same in the U.S. Mail, postage prepaid and properly addressed to him at 250 Administrative Building, 64 North Union Street, Montgomery, Alabama, 36130.

FRANK M. WILSON,
Counsel for Respondent